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Nos. 74-1414 and 74-6518

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARCHIE JAMES SHUMAR, PETITIONER

v.

UNITED STATES OF AMERICA

CLAUDE W. CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that it was improper for the court of appeals, having initially reversed their convictions for conspiracy to violate 18 U.S.C. 1955, to grant the government's motion to extend the time for filing a petition for rehearing pending this Court's decision in *Iannelli* v. *United States*, No. 73-64 (decided March 25, 1975). Petitioners also claim that they were denied effective assistance of counsel. Petitioner Shumar further contends that the evidence on the conspiracy count was insufficient to support his conviction.

On April 25, 1972, petitioners were indicted with 28 other persons in a three-count indictment in the United States District Court for the Southern District of Indiana. Count 1 charged a conspiracy to violate 18 U.S.C. 1955 by conducting a gambling business involving five or more persons in violation of Indiana law; counts 2 and 3 charged substantive offenses in violation of the same statute. Five defendants, including petitioners, were ultimately tried.[1] Petitioners were convicted on all three counts.[2] Petitioner Clarke was sentenced to three years' imprisonment on count 1, subject to the parole eligibility provisions of 18 U.S.C. 4208(a) (2); sentences on counts 2 and 3 were suspended, and Clarke was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1. Petitioner Shumar was sentenced to one year's imprisonment on count 1; sentences on counts 2 and 3 were suspended and Shumar was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1.

The court of appeals affirmed both petitioners' convictions on counts 2 and 3. Their petitions for a writ of certiorari, in which they argued that they were denied effective assistance of counsel and that the evidence was insufficient to support their convictions, were denied on February 18, 1975 (*Shumar* v. *United States*, No. 74-495; *Clarke* v. *United States*, No. 74-5482).

The court of appeals initially reversed petitioners' convictions on the conspiracy count, relying on its earlier

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[1]The indictment was dismissed with respect to four of the other defendants; one defendant pleaded *nolo contendere* to count 1; and twenty defendants pleaded guilty (thirteen to count 1, two to count 2, and five to count 3).

[2]Co-defendants Brady and Baird were convicted on counts 2 and 3 and co-defendant Tomlinson on all three counts.

decision in *United States* v. *Hunter*, 478 F.2d 1019, which held that Wharton's Rule precluded an indictment for conspiracy to violate 18 U.S.C. 1955 (Shumar Pet. App. A1-A12). The issue was then pending before this Court in *Iannelli*, however, and the court of appeals extended the government's time for filing a petition for rehearing until 14 days after decision in that case. *Iannelli* held Wharton's Rule no bar to prosecutions for both substantive violation of and conspiracy to violate Section 1955. The government's petition for rehearing in the instant case was thereupon granted, and petitioner's convictions were affirmed. The court of appeals denied petitioners' petitions for further rehearing (Shumar Pet. App. A23-A24).

1. The government's motion to extend the time for filing a petition for rehearing was out of time, and petitioners say that in granting it the court of appeals acted in disregard of the Federal Rules of Appellate Procedure and in a manner so "fundamentally unfair" (Shumar Pet. 15; Clarke Pet. 10) as to deny them due process.[3]

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[3]In their chronologies both petitioners omit mention of a defense petition for rehearing filed out of time on September 9. The judgment of the court of appeals was originally entered July 31, 1974. Time to petition for rehearing under Rule 40, Fed. R. App. P., thus expired August 14. The government moved to stay the mandate on August 17, within the 21 days allowed for such motions by Rule 41(b). On August 20 the court of appeals granted the motion, staying the mandate until September 20.

In the meantime, defendants filed their untimely petition for rehearing on September 9. The court of appeals entertained the petition and denied it on September 30. The effect of this action was to stay the mandate pending consideration of the petition and further to stay the issuance of the mandate until 7 days after entry of the order denying the petition. *Bowman* v. *Loperena*, 311 U.S. 262; Rule 41(b). Thus the mandate had not yet issued when the government on October 4 filed its second motion for a stay, this time pending decision in *Iannelli*.

The government's motion to extend the time for filing a petition for rehearing, filed October 24, was out of time, however, inasmuch

The granting of the government's untimely motion was not in violation of any of the Federal Rules of Appellate Procedure. Rule 26(b) specifically provides:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time * * *.

The government's motion, based on the pending resolution by this Court of the Wharton's Rule issue, satisfied the "good cause" requirement of Rule 26(b), and the court of appeals did not commit error in granting it.

Nor did the court of appeals inflict "fundamental unfairness" on petitioners by granting the government's motion The federal courts had differed on the effect of Wharton's Rule on indictments for conspiracy to violate Section 1955. *Iannelli* v. *United States, supra,* slip op. at 2-3. The issue was soon to be resolved in *Iannelli,* and when it was, those decisions erecting the Rule as a bar to such indictments were seen to have been in error: the law correctly perceived was and had been to the contrary. Petitioners had no due process right, conferred by accident of jurisdiction, to benefit from incorrect applications of the law, and it was against this possibility that the government sought and the court of appeals properly granted an extension of time in which to petition for rehearing.

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as the time in which to petition for rehearing had expired on October 14. 14 days after entry of the order denying defendants' petition for rehearing. Rules 40, 41(b).

We point out in the text that the court of appeals properly entertained and granted the government's motion: we add that, even if the mandate had issued, it would have been within the court's power to recall it. *Gradsky* v. *United States,* 376 F.2d 993 (C.A. 5).

2. Petitioners' claim that they were denied effective assistance of counsel was raised in their previous petitions for certiorari denied by this Court on February 18, 1975. We rely on the arguments made in our Memorandum in Opposition, Nos. 74-495 and 74-5482.

3. Petitioner Shumar claimed in his earlier petition that the evidence was insufficient to support his convictions for substantive violations of Section 1955. He renews this argument here, adding that the evidence was inadequate to support the conspiracy conviction as well. But the evidence, as summarized in our earlier Memorandum in Opposition, showed that Shumar placed many lay-off bets with the large, ongoing, illegal bookmaking operation run by petitioner Clarke and co-defendant Brown and split his weekly profits or losses with them. From these facts the jury could reasonably infer the existence of an agreement, to which Shumar was party, to violate Section 1955. There was, accordingly, ample evidence to sustain Shumar's conviction on both the conspiracy and substantive counts.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.